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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-204.

JUDICIAL COUNCIL OF THE THIRD CIRCUIT,
Petitioner,

v.

JOSEPH M. NOLAN, IMPERIAL "400" NATIONAL, INC., et al.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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Respondent, in his brief in opposition (pp. 4-7), contends that petitioner, the Judicial Council of the Third Circuit, cannot be represented before this Court by its present counsel. The argument is that, pursuant to 28 U. S. C. § 516, the Judicial Council must be represented by attorneys from the Department of Justice and, failing such representation, the Judicial Council may not proceed further in this litigation.

There is no substance to this argument as a matter of law. However, before discussing the legal point, it is important to note the unusual circumstances here of which respondent seeks to take advantage. In connection with the litigation in the court below, the Judicial Council requested representation by the Department of Justice attorneys and that request was granted by the Attorney General. This

was, in other words, in no sense a case which came to be handled by the Department of Justice attorneys in the ordinary course of business. As made plain by Solicitor General Bork's letter to this Court of September 7, 1973, the decision not to proceed with that representation in connection with the appearance before this Court was based on the possibility of a conflict with the position taken by the Solicitor General's office in *Dooling v. Hilbert*, No. 71-1655. Once the possibility of inconsistent positions was realized, the Solicitor General suggested to petitioner that it should retain private counsel and this was done.[1]

Respondent now argues that, as a result of the Solicitor General's decision, the Judicial Council can go no further in this litigation. There is an ancient principle of statutory construction which completely negates the reading which respondent seeks to give to 28 U. S. C. § 516 in order to reach this result. This Court long ago stated that the general terms of a statute "* * * should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. * * *" *United States v. Kirby*, 7 Wall. 482, 486 (1868). See, also, *Holy Trinity Church v. United States*, 143 U. S. 457, 459 (1892). Respondent's position can be tested, under this principle, against the facts of the *Chandler* case. According to respondent, both parties to that case, a Federal judge on one side and the Judicial Council on the other, had to be represented before this Court by the Solicitor General. This would, of course, have created an absurd situation. Here, respondent's position

1. The possibility of conflict with respect to the scope of power of a Judicial Council between *Dooling* and this case underscores, we submit, the need for definitive review by this Court. And see the brief filed by the Solicitor General as *amicus curiae* in *Chandler v. Judicial Council*, 398 U. S. 74 (1970), in which the Solicitor General took the same position as to the scope of power of a Judicial Council as that urged by petitioner in this case (Brief for the United States as *amicus curiae*, Oct. T. 1969, No. 2 Misc., pp. 41-50).

leads to a no less than an absurd result, namely, that the litigation must cease because the Solicitor General finds himself in a situation involving a possible conflict of interest.

The discretionary power of the Attorney General to afford representation to Federal judges derives primarily from R. S. § 359, presently embodied in 28 U. S. C. § 518(b). That statute provides:

> "(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

It is by virtue of this statute that the power of the Attorney General to afford such representation has been frequently sustained. See *Booth v. Fletcher*, 101 F. 2d 676 (C. A. D. C. 1938), *cert. denied*, 307 U. S. 628 (1939); *Meredith v. VanOosterhout*, 286 F. 2d 216 (C. A. 8, 1960), *cert. denied*, 365 U. S. 835 (1961); *Weiss v. Bonsal*, 344 F. 2d 428 (C. A. 2, 1965). The power to afford representation under 28 U. S. C. § 518 is purely discretionary. There will be, as this Court knows, many situations, including mandamus proceedings, in which the interests of the United States are adverse to those of the Federal judge involved. In such cases, the Federal judge must either obtain representation or be represented by a party to the litigation. See, *e.g.*, *Ex Parte Fahey*, 332 U. S. 258 (1947); *United States v. United States District Court*, 334 U. S. 258 (1948).

The statute upon which respondent relies, 28 U. S. C. § 516, is the codification of a long line of statutes designed to control both the criminal and civil litigation arising out

of the activities of the Executive Branch of Government. The enactment of this statute in 1966 was a restatement of long existing law and no substantive changes in prior law were intended. See, *Hogg v. United States*, 428 F. 2d 274, 278 (C. A. 6, 1970). As the activities of the federal government increased in importance in national life, the need for centralized control became critical to avoid errors and inconsistency in litigation at both trial and appellate levels. The earlier statutes which placed ultimate authority of litigation to which the United States was a party[2] in the Attorney General were strongly reaffirmed by Section 5 of Executive Order 6166 of June 10, 1933. 5 U. S. C. (1958) pp. 139, 141.[3]

In short, then, the whole history of the law embodied in 28 U. S. C. § 516 is that it affirms the authority of the Attorney General over the litigation of the Executive Branch and over the activities of the several United States Attorneys. The statute has no necessary relationship to the unusual occasions on which the Attorney General may be called upon to furnish representation to the Judiciary or to the Congress.[4]

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2. See, *e.g.*, 1 Stat. 73; 16 Stat. 162; 62 Stat. 869, 910; 68 Stat. 1229; R. S. (1878 Ed.) § 346,361; 5 U. S. C. (1940 Ed.) §§ 306, 318, 333; 28 U. S. C. (1946) § 507(b).

3. The text of Section 5 of Executive Order 6166 is set forth in this Court's opinion in *Sullivan v. United States*, 348 U. S. 170, 172, ftn. 2 (1954).

4. Respondent proceeds on the literal basis the Judicial Council is an "agency" and is, therefore, covered by the statute. The meaning to be given "agency" depends on the statutory context in which the word is used and the Congressional purpose embodied in that statute, *United States v. Bramblett*, 348 U. S. 503 (1955), not by attempting to find a fixed meaning in the word. Thus, for example, 28 U. S. C. § 451 defines "court" and "judge" separately from "agency." In other words, the critical factor in interpreting 28 U. S. C. § 516 is its historical purpose, namely, control of litigation arising from the activities of the Executive Branch.

CONCLUSION.

For the reasons set forth in the petition filed on behalf of the Judicial Council, a writ of certiorari should issue.

Respectfully submitted,

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Dated: September 13, 1973